

Foamex, a Limited Partnership and United Paperworkers International Union, AFL-CIO. Case 25-CA-22745

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On June 2, 1994, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, cross-exceptions, and a supporting brief, to which the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent did not violate Section 8(a)(1) by making a promise of benefits to an employee during a union organizing campaign. The General Counsel has excepted to this finding. For the reasons stated below, we conclude that the Respondent's conduct violated Section 8(a)(1) of the Act.

The judge found that Supervisor Kurt Kleinrichert asked employee James Thomas, the initiator of the Union's organizing drive, what the problems were in the facility and why the employees wanted a union. The judge found, and we agree, that this questioning regarding the extent of union support constituted an unlawful interrogation in violation of Section 8(a)(1). After a further discussion of several employees' problems, Kleinrichert went on to ask Thomas if straightening out certain problems with his vacation time would change his mind regarding the Union. Thomas testified that Kleinrichert also told him that he should watch out because Plant Manager Banks had "a lot of spies."

The judge concluded that the statement in regard to straightening out Thomas' vacation problems did not

constitute a promise of benefits in violation of Section 8(a)(1). We disagree. Kleinrichert's comment, made in the context of an unlawful interrogation, impliedly promised to rectify Thomas' problems with his vacation time as an inducement for him not to support the Union and therefore constitutes a violation of Section 8(a)(1) of the Act. See *Gem Urethane Corp.*, 284 NLRB 1349, 1363 (1987); *Metropolitan Life Insurance Co.*, 256 NLRB 626, 633 (1981).

The General Counsel further excepts to the judge's failure to make a finding that Kleinrichert's statement that Banks had "a lot of spies" created an impression of surveillance, as alleged in the complaint. In light of the other unfair labor practices committed by Kleinrichert in this conversation with Thomas, we find that Supervisor Kleinrichert's comment regarding spies created an unlawful impression of surveillance in violation of Section 8(a)(1) of the Act. *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993).

2. The judge also found that the Respondent did not violate Section 8(a)(1) by coercively interrogating its employees regarding a group letter in support of union organizing. We also find merit in the General Counsel's exception to this finding.

The Respondent, by Plant Manager Banks, questioned its employees regarding the authenticity of their signatures on a prounion letter addressed to the Respondent's employees at another plant, who were scheduled to vote in a union election the next day. The judge found that the Respondent had a valid interest in determining the authenticity of its employees' signatures in order to permit the LaPorte supervisors to rebut the inference of support from the Fort Wayne employees. To the contrary, we find that the circumstances of the Respondent's individual questioning of employees constituted coercive interrogation.

The letter signed by the Fort Wayne employees clearly constituted union activity of employees protected by Section 7 of the Act. Further, the individual questioning occurred without any assurance against reprisal and was in the context of numerous unfair labor practices. Finally, we do not find that ascertaining the authenticity of the employees' signatures constituted a legitimate reason justifying interrogation regarding their protected activity. We note that the Respondent had other means, such as a comparison of the purported signatures with those contained in the employees' records in the Respondent's possession, to ascertain their authenticity. See *Master Security Services*, 270 NLRB 543, 550 (1984).

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

3. The judge also failed to make a finding regarding the complaint allegation that in its meetings with groups of employees during the organizing campaign the Respondent unlawfully solicited grievances. We find merit in this exception.

The judge found that Plant Superintendent Boestar asked the employees in these meetings about their problems and asked for suggestions of possible management solutions. We find that these statements constituted grievance solicitation with an implied promise to resolve them, in violation of Section 8(a)(1) of the Act. See *Matheson Fast Freight*, 297 NLRB 63, 69 (1989); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Foamex, a Limited Partnership, Fort Wayne, Indiana, with its general partner being 21 Foam Co., Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(a).

“(a) Unlawfully threatening employees with discharge and other reprisals because of their union or other protected concerted activities; coercively interrogating them concerning their membership in, support of, and sympathy for the Union or any other labor organization; telling them that it would be futile for them to select the Union, or any other labor organization, as their collective-bargaining representative; interfering with employees in the exercise of their rights guaranteed by Section 7 of the Act by soliciting grievances or promising them benefits, in order to discourage their union activity; or creating the impression of surveillance of their lawful union activities.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully threaten them with discharge or other reprisals because of their membership in, sympathy for, or activities on behalf of United Paperworkers International Union, AFL-CIO or any other labor organization, nor will we coercively interrogate our employees concerning their union or other protected concerted activities, tell them that it will be fu-

tile to select a labor organization as their collective-bargaining representative, solicit grievances or promise them benefits in order to discourage union activity, or create the impression of surveillance of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FOAMEX, A LIMITED PARTNERSHIP

Merrie Thompson, Esq., for the General Counsel.

W. Kerby Bowling II and *Joseph M. Crout, Esqs. (Bowling, Bowling & Associates)*, of Memphis, Tennessee, for the Respondent.

Ted Curtis Sautter, International Organizer, of North Webster, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This erstwhile consolidated matter¹ was heard in Fort Wayne, Indiana, on March 24, 1994, on the General Counsel's complaint, dated November 18, 1993, as amended at the hearing, which alleges, in substance,² that in July, August, and September 1993, Respondent,³ by name supervisors, violated Section 8(a)(1) of the Act by coercive interrogation, creating an impression of unlawful surveillance, telling employees that unionization⁴ would be futile, threatening them with discharge and other unspecified reprisals, soliciting employee complaints and grievances, and promising them increased benefits and improved terms and conditions of employment. All of the above, constituting violations of Section 8(a)(1) of the Act, allegedly interfered with, restrained, and coerced employees in the rights guaranteed them by Section 7 of the National Labor Relations Act (the Act).

Respondent filed a timely answer admitting certain allegations of the complaint, as amended at the hearing, denying others, and denying the commission of unfair labor practices.

At the hearing, the parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing the parties waived final argument and elected to file posthearing briefs which have been carefully considered.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, comparing such testimony with the testimony of adverse witnesses, the interests of the witnesses, and documentary evidence, I make the following

¹ The allegations of a separate complaint in Case 25-CA-22666 were settled and severed by the Regional Director prior to the opening of the hearing. Those allegations regarded alleged unfair labor practices occurring at Respondent's plant in LaPorte, Indiana.

² The original charge in Case 25-CA-22745 was filed and served by the Union, as described hereinafter, on September 16, 1993. The Union's amended charge in this case was filed on November 9, 1993, and served on Respondent on November 10, 1993.

³ The name of Respondent appears as amended at the hearing.

⁴ The name of the Union appears as amended at the hearing.

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

At the opening of the hearing, the parties amended the complaint regarding the name of Respondent. The General Counsel thereby alleged and Respondent admitted that at all material times Respondent, Foamex, a Limited Partnership, is a Delaware Limited Partnership, with the general partner being 21 Foam Co., Inc. At all material times, Respondent, with an office and place of business in Fort Wayne, Indiana (the Fort Wayne facility), has been engaged in the manufacture of foam and latex products. During the 12-month period preceding issuance of the complaint, Respondent, in the conduct of its business operations, purchased and received at its Fort Wayne facility goods valued in excess of \$50,000 directly from points outside the State of Indiana and, in the same period, sold and shipped from the facility goods valued in excess of \$50,000 directly to points outside the State of Indiana. The complaint alleges, Respondent admits, and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint, as amended at the opening of the hearing, alleges, and Respondent then admitted, that at all material times, the Union here is United Paperworkers International Union, AFL-CIO, formerly known as International Union, Allied Industrial Workers of America, AFL-CIO. I find, as Respondent admits, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.⁵

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In the summer and fall of 1993, Respondent's Fort Wayne facility employed a total of 135 employees of whom about 90 were production and maintenance employees. Sometime in or about late July 1993, Fort Wayne employee James H. Thomas, a machine operator, contacted Union Organizer Ted Sautter by telephone and thereafter spoke to 15 to 20 employees seeking to organize them and telling them of a forthcoming meeting to be held in Thomas' home. Apparently at or about the same time, an organizational effort, 100 miles away, at Respondent's LaPorte, Indiana plant was ending. A Board-conducted election at the LaPorte facility was held on Friday, September 10, 1993. Neither the General Counsel nor the Union contest Respondent's assertion (G.C. Exh. 2) that, at the LaPorte facility, the unit employees rejected unionization by a vote of 74 to 40 with 8 challenged ballots. Further, there is no dispute that Respondent vigorously opposed unionization in and among the 90 production maintenance employees at Respondent's Fort Wayne plant (G.C. Exh. 2).

In any event, sometime in late July or early August, about four or five production employees met in the Thomas home

pursuant to his advising them of the union meeting to be held there. Thomas told them that a union representative would be at the house; that they could speak to him and decide if they wanted to try the Union or not. The meeting occurred about a week after Thomas first contacted Union Organizer Sautter.

At about 2:30 p.m. of the day prior to the union meeting at Thomas' house, Thomas testified that while he was at work cleaning up scraps at his machine, Plant Manager William Banks stopped him and said that he had heard that Thomas was having a union meeting at his house. Thomas testified that he denied it but said that there would probably be a union in the plant because the employees were afraid for their jobs. While Thomas recalled that the conversation continued, he did not recall the remainder but recalled that Banks then walked away. About 15 feet from where this conversation took place, two employees, Cindy Collins and Kevin Ebnit, having observed the conversation, approached Thomas, Collins remarking that Thomas was not looking well.⁶ When Cindy Collins asked him what they had talked about, Thomas told her that Banks knew about the union meeting. Cindy Collins said that someone had probably told Banks of the meeting.

The next day, after Thomas met with the union organizer and the four employees, Banks approached him at his machine with Thomas' attendance record. Banks told him that by August, problems concerning Thomas' attendance record, particularly his annual leave record, would be cleared up (Tr. 66). As Banks was walking away he told Thomas to remember that: "the same tide that rolls in rolls out" (Tr. 67). Employees Mack Daniels and Jim Minnick observed the conversation and then approached Thomas when Banks left. They asked him what they had been talking about and Thomas told them (Tr. 69).

After the union meeting at Thomas' house, Thomas and employees Jim Minnick, Harold Bauermeister, and other employees distributed union cards in the street in front of Respondent's parking lot in the morning (Tr. 70). Thomas also passed out cards in the break area and in the smoking area.

Although Banks speaks to Thomas and other employees on the shop floor regularly, he denied that he ever spoke with Thomas concerning the holding of the union meeting at Thomas' house (Tr. 222). He also denied speaking with Thomas regarding Thomas' attendance record and specifically denied using the expression "the tide rolls in and the tide rolls out."

Sometime in late August or early September, Thomas testified that he had conversations with Maintenance Supervisor Kurt Kleinrichert. Thomas testified that one morning, while he was working at his machine, Kleinrichert approached him and wanted to know what the problems were and why the employees wanted the Union (Tr. 79). Thomas told him that the employees were afraid for their jobs and that Respondent changed the rules from day to day and didn't stick to its rules. Thomas said that Kleinrichert told him that maybe things would change because Respondent was planning on hiring a personnel manager. Thomas answered that Respondent could hire anybody they wanted to but that Banks was in ultimate control and had the final say (Tr. 80).

⁵ The complaint alleges and Respondent also admits that the following persons are its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act: William Banks, plant manager; Kurt Kleinrichert, maintenance supervisor; Bruce Boestar, plant superintendent; Greg Dee, manager; and Wally Myers, supervisor.

⁶ At the time of the hearing, employee Kevin Ebnit was deceased (Tr. 61).

Kleinrichert then told Thomas that he himself had been in a controversial discussion with Banks concerning Banks' reprimanding employees in the facility and that Banks told him that if he did not like it at the facility, he (Kleinrichert) could "hit the road" (Tr. 80).

Finally, Kleinrichert asked Thomas whether, if Banks straightened out Thomas' vacation problem, that would "make things better"? Banks said it would "make things better but it would not solve the problem which was that the Respondent can do what it wants to do" (Tr. 83). Kleinrichert told him that he should watch out because Banks had a lot of spies. Thomas told him that it made no difference to him because everybody knew that Thomas was for the Union anyway.

Indeed, there is no dispute that in prior union organizational efforts, Thomas was identified as a union supporter (Tr. 127-128; 182-183).

On the next day, Kleinrichert approached Thomas (Tr. 85) and told him that Plant Superintendent Bruce Boester was going to have meetings with employees and Kleinrichert asked him if he would go and talk to Boester. Thomas agreed to meet with Boester.

In fact, within about a week after the present Union's organizational effort (Tr. 88), Plant Superintendent Boester and Supervisor Greg Dee had group meetings with employees. This meeting between Thomas and Boester, however, was a one-on-one meeting.

At the group meetings, Boester had inquired into the employees' problems and asked the employees whether they could work out their problems in the plant. The word union was not mentioned but Boester wanted to know what the employees' problems were (Tr. 89). Boester also asked the employees to give Respondent a chance to see if they could work things out; and that things would improve because new supervision had just taken over from the old system (Tr. 90). A week later, Kleinrichert approached Thomas and, as above-noted, asked him to meet one on one with Boester.

At this one-on-one meeting, Boester asked him why he and the employees wanted the Union (Tr. 122) and what good a union would do. Thomas told him that the only thing a union does is make the employer stick to a written rule which exists for a 3-year period (Tr. 90-91). Thomas told Boester that he knew, and Boester knew, that a union was not going to get anything that was not subject to negotiation (Tr. 92-93).

About 2 weeks after the conversation with Boester, Supervisor Dee approached Thomas who was working at his machine and they engaged in a conversation relating to complaints and gripes (Tr. 95). Dee told Thomas to give Plant Manager Banks "a chance"; that changes and improvements were going to be made (Tr. 96). With regard to Dee's asking Thomas to give management a chance because "there were going to be some changes made," Thomas admitted that in the spring of 1993, before the Union appeared, there was a meeting of employees after Banks had become plant manager. Banks told them employment conditions were going to change and that there would be different pay scales and raises. In fact a large portion of the plant received a pay increase in the first part of July 1993 before any union activity occurred (Tr. 124-125).

B. Kleinrichert's Testimony

Kleinrichert testified that in August 1993 he was called to Thomas' machine by Supervisor Myers because of a malfunction on Thomas' machine.

After discussing machine problems and other problems including how both Thomas and Kleinrichert were subject to stress on the job, and where Kleinrichert was giving Banks a lot of heat because of the volume of production that Respondent was requiring (Tr. 169), Banks ultimately told Kleinrichert (and as Thomas testified) that if Kleinrichert could not handle the job, he should quit (Tr. 170). Kleinrichert testified that the matter of the Union came up when, describing the attendance record problems that Respondent said he had, Thomas said he was "getting the shaft" and that was one of the reasons why he needed a union (Tr. 171). Kleinrichert testified that the above conversation was the only conversation with Kleinrichert in which the union issue was raised (Tr. 173). In particular, Kleinrichert denied ever mentioning to Thomas that Plant Manager Banks had spies among the employees (Tr. 175); denied questioning Thomas about other employees' union sympathies or activities (Tr. 175); but Kleinrichert did admit asking Thomas whether, if Respondent straightened out his vacation problems, that would change his mind about anything or help him (Tr. 176). That was in the same conversation in which Thomas said that Respondent's position with regard to his vacation problem was one of the reasons why the employees needed a union (Tr. 176).

Regardless whether there was one or two conversations between Kleinrichert and Thomas, I find, in view of Kleinrichert's admission on his own direct examination, that, in the same conversation in which the question of the necessity of having a union occurred he asked Thomas whether, if Thomas' vacation problem was straightened out, that would change his mind. I do not regard this as an implied promise of fixing the vacation problem.

Contrary to Kleinrichert's recollection and denial, I credit Thomas' testimony that Kleinrichert asked him not only why Thomas wanted the Union but why the employees wanted the Union. However innocent Kleinrichert's intention was in raising the question, and notwithstanding that Thomas was an open and well-known union advocate, and notwithstanding that the question why Thomas, a known union advocate, wanted the Union may have been privileged under the Board's present rule regarding the necessity for a coercive element in unlawful interrogation, there is no such privilege attaching to Kleinrichert's questioning with regard to why other employees wanted the Union. Thus while *Sunnyvale Medical Center*, 277 NLRB 1217 (1985), may support a doctrine of a lack of coerciveness in the inquiry to a prominent union adherent of his own union sentiments (absent other coercive elements), Kleinrichert could not lawfully inquire why other employees wanted the Union. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). Thus while *Rossmore House*, 269 NLRB 1176 (1984), may require a showing of coerciveness under all the circumstances of the case before unlawful interrogation is found, where an attempt is made to seek out the extent of employee support, as Kleinrichert's question suggested, it was designed to have Thomas divulge the extent of union organization among the employees. The act is designed so that employees are permitted to keep such informa-

tion to themselves. Even low-keyed or friendly interrogation, designed to discover the extent of union organization and the basis for it, is unlawful, *NLRB v. Laredo Coca Cola Bottling Co.*, supra; *Quemetco, Inc.*, 223 NLRB 470 (1976). Employer knowledge of employee union sympathy, gained by unlawful inquiry, tends to prevent its free exercise. See *Crown, Cork & Seal Co.*, 308 NLRB 445, 448-451 (1992). In short, I find that Kleinrichert's question to Thomas regarding the reasons for other employees supporting the Union, certainly in the presence of Respondent's hostility to the union organizational attempt, violates Section 8(a)(1) of the Act. This is the only violation I find with regard to Kleinrichert.

With regard to the Boestar private meeting, which Boestar denies occurred (Tr. 191-192), I credit Thomas. While it is true that Boestar asked Thomas what good a union would do him, and the conversation related to Thomas stating that a union would require Respondent to observe its own rules, I find nothing coercive in this conversation concerning why Thomas, a known and open union advocate, wanted the Union. The same is not true regarding Boestar's inquiring why the employees wanted the Union (Tr. 122). Such a question, I have noted with regard to Kleinrichert's similar question (Tr. 79), violates Section 8(a)(1) of the Act.

With regard to Supervisor Dee admonishing Thomas to give Respondent a chance and that there would be improvements over the old administration, I find, consistent with Respondent's argument, that the statement is ambiguous. The statement did not necessarily suggest that Respondent would improve working conditions because of the advent of the Union and as a device to thwart the union organizing effort; rather, it could have easily have referred back to the fact that Respondent, in June or July 1993, before the advent of the Union, raised wages to a substantial portion of Respondent's unit employees. Thus Dee's admonition to Thomas could well relate to giving Respondent a chance to fulfill its prior promises to continually improve working conditions which promise occurred well before the advent of the union organizing effort. I therefore recommend to the Board that the allegation regarding Dee's soliciting employee complaints and promising increased benefits and improving terms and conditions of employment be dismissed.

Further, to the extent that the complaint alleges other acts of Kleinrichert in violation of Section 8(a)(1) of the Act, I recommend to the Board that they be dismissed as unproven.

C. The Testimony of Harold S. Bauermeister

Bauermeister, employed by Respondent for 24 years, is a machine operator like Thomas. Although Bauermeister testified that he'd openly passed out union literature and cards in July 1993, Banks did not identify Bauermeister as a union advocate and testified that he knew only that Thomas and two other employees (Jim Minnick and Mack Daniels) distributed the cards at the plant gate (Tr. 248-249).

On or about the morning of September 9, 1993, on the stationery of the Union, 12 unit employees at the Fort Wayne plant signed a letter addressed to their "fellow Foamex workers" at the LaPorte Plant wishing them "good luck on your vote to unionize this Friday [September 10, 1993]." This document (G.C. Exh. 3) also states that the Fort Wayne plant employees were organizing their own union; that the "only way to secure what we have and get better wages,

benefits and working conditions is to have a union contract"; that the employees want to "go forward and organize all non-union Foamex plants in Indiana"; and that as union members, the employees would "make Foamex a better more secure place to work." The first signature appearing thereon is James H. Thomas'. The fourth signature is Harold L. Bauermeister. The fifth of the dozen signatures is that of Ruby Williams. The signers' purpose was to have the document distributed immediately before the September 10 election at the LaPorte plant to show support of the Fort Wayne employees for unionization in LaPorte.

Fort Wayne Plant Manager William Banks first saw this document (G.C. Exh. 3) later on Thursday, September 9, when it was faxed to him from the LaPorte Plant by the LaPorte facility plant manager (Tr. 223). Banks understood from LaPorte that the document had been distributed to all of the LaPorte hourly employees. On the next day (September 10), he spoke to the employees whose names appeared on the document. First was Ruby Williams because her workstation was the first on his tour. His conversation with Ruby Williams will be treated below.

Banks testified that he told Harold Bauermeister approximately the same thing that he told Ruby Williams. He asked him if his signature was on the letter and when Bauermeister said that it was, he told Bauermeister that he was surprised to see his name there; and was a little bit hurt and embarrassed that Bauermeister would involve himself "in activities, union organizing activities, outside of this facility" (Tr. 226). Banks testified that he told Bauermeister, as he told Williams, that he had the right to organize in Fort Wayne and "nothing is going to happen to you . . . [But] I do think its out of place and in ill taste for you to be involved in activities at the Foamex LaPorte facility" (Tr. 226). Banks testified that Bauermeister made no response. If I credited Banks' testimony, then in the absence of any threat or further statement of coercion with regard to Bauermeister's joining in support for the union effort at the LaPorte facility, I would find that Bank's statement that it was out of place and in ill taste to engage in such activity falls considerably short of restraint or coercion. Banks' hurt feelings and surprise would amount only to expressions of purely personal opinion about Bauermeister's protected activities. Absent some reference to Bauermeister's disloyalty or other threats or coercion, an expression of hurt feelings and surprise does not amount to unlawful restraint or coercion within the meaning of Section 8(a)(1) of the Act. *Oklahoma Installation Co.*, 309 NLRB 776 (1992). For reasons appearing hereafter, however, I do not credit Banks concerning his conversation with Bauermeister. I credit Bauermeister.

Bauermeister testified that in the morning of the day after he signed the document⁷ supporting the LaPorte organization effort, Banks came up behind him while he was operating his machine, tapped him on the shoulder, and asked him to verify his signature on that document (G.C. Exh. 3). After

⁷Based on Banks' and Bauermeister's credited testimony, I find that the LaPorte letter was circulated and signed in Fort Wayne on Thursday morning, September 9, and circulated at LaPorte later on the same day. It was faxed to Banks later on September 9. Banks therefore spoke to Bauermeister and threatened him in the morning of the next day, Friday, September 10.

Bauermeister admitted that the signature was his, Bauermeister said that Banks said to him:

[T]he next thing you do wrong, you'll be fired. So you better do your job and you better do it well. [As Banks started to walk away, he said] when you . . . bring another company's business into ours . . . you cross border lines. . . . You better do your job and you better do it well, from here on out. Don't expect any favors from us and we won't expect any favors from you. . . . Oh, by the way, I have on record that you threatened to walk out.

Bauermeister asked him when he had threatened to walk out and Banks said that he was not going into that issue and walked away (Tr. 136).

Bauermeister admitted that 13 or 14 years before this conversation, he threatened to walk off the job; also, that about a year before he gave his affidavit to the NLRB in this case, in a dispute with Banks concerning an obligation to perform a job on overtime (Tr. 147–149), he asked Banks what would happen if he walked off the job.

Banks particularly denied making any of the above statements to Bauermeister (Tr. 235–236).

For the reasons stated in the section of this decision entitled "Discussion," I credit Bauermeister's testimony and find, in accordance with the allegations of the complaint, that on or about September 10, 1993, Banks threatened Bauermeister with discharge because of his engaging in the union activity of supporting the contemporaneous union organizing effort at the LaPorte facility. Banks' admonition that he'd better do his work well or else he would be discharged violated Section 8(a)(1) of the Act.

To the extent that the complaint (pars. 5(c), (i)) alleges that Banks unlawfully interrogated Bauermeister, I conclude that his questioning of Bauermeister concerning Bauermeister's signature on the document was a mere prelude to and a necessary preliminary to his subsequent unlawful threat of discharge in the same conversation. I thus find that Bank's interrogation of Bauermeister concerning the validity of Bauermeister's signature on the card was part of an unlawful threat and constituted unlawful, coercive interrogation in violation of Section 8(a)(1) of the Act.

D. Thomas' Testimony; the Document Supporting the LaPorte Employees

One night toward the end of the first week in September, Union Organizer Sautter asked Banks if he could get a letter signed by Fort Wayne employees supporting the union organizing campaign in LaPorte (Tr. 71). Thomas, working the shift commencing at 3 a.m., said he would meet Sautter outside the plant at the 7 a.m. breaktime. He met Sautter and Sautter gave him the letter for employee signatures (Tr. 71). Thereafter, on the same day, Thomas went to the plant "smoke pit" and told the employees that the Union had given him a letter supporting the employees at LaPorte who were having an election (Tr. 143). Employees signed the letter. Thomas then went to the "break room" and told other employees the same thing and other employees signed the letter. As the employees on the third shift were leaving, Thomas gave the letter to a third-shift employee to give to Sautter (Tr. 72).

Later on the same day, in the afternoon, he coincidentally was in the restroom with Plant Manager Banks (Tr. 76). After they exchanged salutations, Banks, who testified that he did not see the letter until September 9 (when it was faxed from the LaPorte plant, already bearing all the Fort Wayne employee signatures), told Thomas before exiting (Tr. 76–77):

I'm going to tell you one thing. Foamex is tired of the stuff you're doing around here. And no union is going to get in this plant and we're going to put a stop to it.

In the above exchange between Banks and Thomas, I credit Thomas over Banks' version (Tr. 219–200).⁸ I note, in passing, that the evidence shows that this unlawful threat apparently occurred *prior* to circulation of the letter at the LaPorte facility. This conversation with Banks occurred before Banks received a copy of the letter by fax on September 9. Contrary to Banks' testimony, I conclude in any case that, whether or not Banks had already seen the letter, he knew of its circulation and that the threat to Thomas was derived from the circulation of that document (G.C. Exh. 3) among Respondent's unit employees. I note, in addition, that in the morning of the next day, September 10, after Banks received the document from LaPorte, in verifying Bauermeister's signature, Banks was sufficiently aroused to threaten to discharge Bauermeister whose union sympathies Banks had not previously suspected.

E. The Testimony of James Barfield

Barfield, a machine operator employed by Respondent for 18 years, testified that he signed the document (G.C. Exh. 3) to support union organization at LaPorte.⁹ Within a week of its circulation at the LaPorte facility, and in any case, after it had been faxed to the Fort Wayne plant, Banks had a conversation with Barfield while Barfield was working his machine.

Barfield testified that Banks told him that he was disappointed that he had signed the letter and, of all the names on the letter, he was most disappointed by Barfield's signature on the letter. He recalled that Banks did not mention the Union; that Banks said that Barfield had had "credibility in the Company" (Tr. 158) and that Barfield had lost some of that credibility (Tr. 159–160).

To the extent that the complaint alleges any unlawful interrogation or threat by Banks against Barfield, I conclude that the General Counsel has failed in any such proof. Insofar as interrogation goes, I conclude that Banks had a right to inquire into the genuineness of Barfield's signature. The document (G.C. Exh. 3) is unlike a signed union authoriza-

⁸Banks admitted (Tr. 219–220) that he had a bathroom conversation with Thomas in September 1993. Banks testified that he told Thomas only that there was information being spread around the Fort Wayne facility that the LaPorte facility was going to have a \$2 pay cut. Banks says that he urged Thomas to tell the truth and to let the employees know that there was not going to be a pay cut at LaPorte (Tr. 219–220).

⁹To the extent that Banks testified that Barfield said he never read the document before he signed it (Tr. 227–228), such testimony may be technically true. To the extent that, Banks, by such testimony, was implying that Barfield didn't know the contents of the LaPorte letter, I would not accept such implication.

tion card ostensibly gained in the secrecy of an organizing campaign. A signature on an organization card is confidential and essentially none of the employer's business except as subsequent litigation might make it relevant. The document signed by Barfield and other employees was not confidential, certainly not after it had been circulated at the LaPorte facility. Banks did not need to inquire of any of the employees who signed the document whether there was union activity at the Fort Wayne facility. He already knew that and had already unlawfully threatened Thomas and Bauermeister. He knew of the union meeting a month before.

Banks, however, did have an interest in ascertaining the genuineness of the signatures appearing on the document. If the signatures were disavowed by the Fort Wayne employees, Banks would have a clear right to inform the LaPorte facility to permit the LaPorte supervisors to rebut the inference of support from the employees at the Fort Wayne facility. Once Barfield admitted that Banks questioned him after Banks had received the faxed document from the LaPorte facility, there can be no question that the document was not in any way confidential or meant to be kept from Respondent's eyes. Rather, the document, with signatures, had already been circulated at LaPorte and thus had become union campaign material at LaPorte. I conclude that Banks had a legitimate interest in ascertaining the genuineness of the Fort Wayne employees' signatures. Thus, I conclude that in the absence of any other elements of coercion or restraint, Bank's question to Barfield was not coercive interrogation.

Nor is there any element of coercion in Banks expressing to Barfield his disappointment in Barfield supporting the Union and his assertion that Barfield had lost "credibility." The loss of credibility, I conclude, does not amount to an assertion of Barfield's disloyalty to Respondent or to Banks. Banks' disappointment and Barfield's alleged loss of credibility in Banks' eyes is not a statement so coercive as to make the entire inquiry a warning or coercive interrogation in violation of Section 8(a)(1) of the Act. *Oklahoma Installation Co.*, 309 NLRB 776 (1992). I therefore recommend that any alleged unlawful threat or coercive interrogation relating to the conversation between Banks and Barfield be dismissed as unproven.

To the extent that, in a conversation in August 1993, within a day or so after the August meeting of employees in Thomas' house regarding possible interest in and support of the Union, Thomas had a conversation with Banks concerning a dispute over vacation days wherein Banks allegedly said that the "tide that rolls in rolls out" (Tr. 69), I conclude that the statement is too ambiguous to constitute restraint or coercion within the meaning of Section 8(a)(1) of the Act. The fact that Thomas believed that Banks was suggesting that Thomas and the Union might have the upper hand at the present time but thereafter the Respondent would have the upper hand, that is a matter of speculation and conjecture. In fact, Banks said no such thing. All he said was that the tide that rolls in rolls out. There is insufficient proof that this meant the Union. And even if it did, it would seem to mean that union support among the employees is ephemeral. I recommend that to the extent that Banks made such a statement, it be found not in violation of Section 8(a)(1), whether interrogation, threat, promise, or otherwise.

F. The Testimony of Ruby J. Williams

Williams, a witness called by Respondent, has been employed by Respondent for 17 years and became a machinist in February or March 1993, after 16 years of employment (Tr. 207). She testified that when Thomas gave her the LaPorte document (G.C. Exh. 3) he said "something" about a union. Williams said she paid no attention to it and signed it (Tr. 198) without realizing that it was being sent to the LaPorte facility (Tr. 199).

She testified that on the same morning that she signed it,¹⁰ Banks approached her with regard to the document that she signed. She said he asked her whether it was her signature and when she affirmed that it was, he said: "Is this the answer" (Tr. 199). She said: "I don't know Bill . . . we both are aware that maybe there are some changes that need to be made" (Tr. 200). When Banks repeated "is this the way," Williams said: "I'm not sure" and Banks walked away.

In any event, she thereafter angrily asked Thomas: "What the hell was that you had me sign?" (Tr. 203). Thomas told her that he thought she knew what she had signed. Williams said that she had not really paid attention and that she recalled only that Thomas had said something about the Union and she signed it (Tr. 203). She then told Thomas that she wanted her union authorization card returned (Tr. 204). When Thomas told her that he had given it to the union agent that morning, she asked how to get in touch with the union agent and get her card back. She testified that she told Thomas that she had not really been interested in the Union and had signed the union authorization card as a matter of friendship for Thomas. Williams recalled that Thomas said to her: "Oh, he's threatened you, too? . . . he's been threatening a lot of people" (Tr. 205-206). Williams denied that Banks had threatened her (Tr. 206).

Williams testified that her request for the return of her card was not a result of anything that Banks said. In response to the question of why she asked for the return of her card, she testified: "I suppose to be perfectly honest because I never wanted to give it in [to the union] the first place" (Tr. 211). She admitted, on cross-examination, that she had the card in her possession longer than 2 weeks prior to the time that she signed the letter in support of the LaPorte employees' organization.

Discussion and Conclusions

This case is determined essentially on the credibility of the witnesses: particularly their demeanor as they testified, with due regard to the interest of the witnesses, their spontaneity, perceptiveness, and the reasonableness of their testimony in the context of the events. In this regard, I have taken into account the common confusion of witnesses with regard to

¹⁰ If credited, this testimony might be thought to further corroborate Thomas' credited version of the bathroom conversation with Banks. I do not credit it. Banks, on this record, did not have the fax copy until the afternoon of its September 9 circulation among the LaPorte employees. Thus, Williams did not see her signature on the LaPorte letter on the morning she signed it. She saw it on the next day, on the morning of September 10 (a day after it was faxed to Banks). As above noted, when Banks spoke to Thomas in the bathroom, Banks did not yet have the LaPorte letter. Banks, I find, spoke to Williams and Bauermeister on September 10.

dates, days, and perhaps even sequence of occurrences. The crucial question is not measuring credibility by virtue of merely an ostensible clear recollection of dates and days, but an evaluation, ultimately, of the credibility and veracity of a particular witness. The Board, with court approval, has taken into account, in establishing ultimate veracity, the inability of a truthful witness to remember particular dates, days, or even sequence of events. See *Plumbers Local 195 (Stone & Webster Engineering Corp.)*, 240 NLRB 504 (1979), enfd. 606 F.2d 320 (5th Cir. 1979).

As an essential preliminary matter, my observation of the demeanor of the two principal adversary witnesses, Thomas and Banks, left little room for establishing the veracity of one over the other. While Thomas' testimony was somewhat confusing in terms of dates and sequence, I do not lay that problem solely at his feet. Banks, without question, was a forceful, clear, intelligent, and persuasive witness. I have nevertheless substantially discredited Banks and credited Thomas' testimony regarding at least two unlawful threats by Banks, violating Section 8(a)(1), relating to Thomas' role as the principal union activist and supporter in the Fort Wayne facility. I did so on the following grounds:

(1) The most particular weight in the balance establishing Thomas' credibility and veracity over that of Banks was my observation and estimation of the veracity of Harold Bauermeister. I was impressed by Bauermeister's straightforwardness which convinced me that he was without guile in the giving of his testimony. His direct testimony struck me as clearly believable and his testimony on cross-examination was not shaken. Respondent's witnesses did not identify him as a union advocate. If I were to credit Bauermeister, I would necessarily discredit Banks' denial that he threatened Bauermeister. Bauermeister credibly recounted his conversation when Banks tapped him on the shoulder, Banks first establishing that Bauermeister signed the LaPorte letter, then admonishing that he'd better be careful the way he did his work or else he would be fired. I credit Bauermeister.

(2) While my crediting Bauermeister, necessarily discrediting Banks' denial, does not necessarily require that I credit Thomas, I have nevertheless concluded that Thomas basically was telling the truth and that Banks' otherwise impressive testimony denying these interrogations and threats was untrue. I reach this conclusion after weighing both Banks' and Thomas' interests in the matter. I conclude that Banks, newly promoted as plant manager, was particularly interested in seeing to it that, whatever the outcome of the voting in the LaPorte facility, he would not suffer the fate of having his Fort Wayne plant organized by the Union. Although he may ordinarily be a restrained and careful person with regard to labor relations, I regard his discovery of Fort Wayne employees circulating and then signing a document in support of LaPorte employees was sufficiently disturbing so that Banks was no longer contained within the bounds of lawful opposition to the Fort Wayne employees' organizational effort. He stepped over into coercive and restraining statements in violation of Section 8(a)(1) to both Bauermeister and Thomas including unlawful interrogation of Bauermeister.¹¹

¹¹ While I had little trouble in crediting Bauermeister, I was concerned by the General Counsel's unexplained failure to corroborate Thomas' testimony on being interrogated in August by Banks concurring Thomas holding a union meeting. Immediately on Banks'

(3) Then there is the testimony of Ruby J. Williams. As I observed Williams, I concluded that, of all the witnesses, she seemed to me to be the most perceptive and knowledgeable. While it is possible that, as she testified, she signed her union card out of mere friendship with Thomas, I do not credit her testimony that she did not know that she was signing the LaPorte document to show support for the organizational effort of the LaPorte facility employees. This would be true whether or not Thomas explained to her what the function of the letter was. He testified that he explained it to employees both in the smoking pit and in the breakroom. Thomas' testimony is credited. In any event, Ruby Williams knew what she was signing.

Of greater consequence is that although she denied that Banks threatened her when he questioned her signature appearing on the LaPorte document, I do not accept the truthfulness of her testimony that Banks' questioning had nothing to do with her request for the recapture of her signed card. While I do not make a finding that any of Banks' questioning of Williams, on the present record, constitutes a violation of Section 8(a)(1) of the Act, I find that Williams' further testimony is untruthful. I was particularly dissatisfied with her explanation that although Banks did not threaten her, she angrily confronted Thomas on the LaPorte document and angrily demanded return of her union card. If Banks' inquiry on her signature was so bland, there was no explanation for her anger at Thomas.

In addition, her testimony (Tr. 211) was that she requested the return of her authorization card because: "I suppose to be perfectly honest because I never wanted to give it [to the union] in the first place." She testified that she had the card more than 2 weeks before she signed it. It seems to me that 2 weeks would give her sufficient time to reflect on the wisdom of signing and submitting the card regardless whether friendship for Thomas was also motive to support the Union. Even if pure friendship was the exclusive motive for submitting the card to the union agent, I find that her testimony, that she never wanted to submit it to the Union, to be an attempt to show lukewarm support for the Union at all times. An employee with Williams' intelligence and common sense who signs a union authorization card and then signs a document supporting union activities of coemployees in a distant facility cannot be heard reasonably to say that she really did not want to support the Union in the first place. Such testimony, I believe, tends to establish the vehemence of Banks' questioning of Williams and other employees. It leads me to conclude that on some occasions, perhaps not with Williams or Barfield, Banks stepped over the line and made a threat to Bauermeister and generally threatened Thomas as the leader of the Fort Wayne union movement.

(4) I was impressed by Williams' testimony (Tr. 205-206) that when she told Thomas that she wanted the return of her signed union authorization card, he asked her: "Oh, [Banks] threatened you, too? . . . He's been threatening a lot of people." While Williams denied being threatened by Banks, I

leaving the area, employee Cindy Collins asked what the conversation was about and Thomas told her. Collins was not produced. Similarly, but of lesser importance was the General Counsel's failure to corroborate Thomas' testimony on "the tide rolls in" where Thomas allegedly recounted this Banks statement shortly afterwards to Jim Minnick and Mack Daniels.

was impressed by her recollection of Thomas' apparently spontaneous response asserting Banks' threats to employees.

CONCLUSIONS OF LAW

1. The Respondent, Foamex, a Limited Partnership, is a Delaware limited partnership with the general partner of 21 Foam Co., Inc., and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Paperworkers International Union, AFL-CIO, has been and is a labor organization within the meaning of Section 2(5) of the Act at all material times.

3. On or about early August and September 9, 1993, Respondent, by its plant manager, William Banks, by its plant superintendent, Bruce Boestar, and its maintenance supervisor, Kurt Kleinrichert, coercively interrogated employees with regard to their membership in, sympathy for, and support of the Union and because of their sympathy for and support of the lawful organizational effort of employees at Respondent's LaPorte, Indiana facility in violation of Section 8(a)(1) of the Act.

4. In or about September 8 and 9, 1993, Respondent, by its plant manager, William Banks, in violation of Section 8(a)(1) of the Act unlawfully threatened employees with discharge because of their membership in, sympathy for, and support of the Union and the lawful organizational effort of employees at Respondent's LaPorte, Indiana facility.

5. In or about August 1993, Respondent, by Plant Manager Banks, created the impression of unlawful surveillance of its employees' union activities, in violation of Section 8(a)(1) of the Act.

6. In or about September 9, 1993, Respondent, by its plant manager, William Banks, by telling employees that no union was going to get into the plant and that Respondent was going to put a stop to it, warned its employees that it would be futile for them to select a union as their bargaining representative, all in violation of Section 8(a)(1) of the Act as alleged.

7. Respondent did not violate Section 8(a)(1) or any other section of the Act except as found above.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action including the posting of the notice in order to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, Foamex, a Limited Partnership, with its general partner being 21 Foam Co., Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Unlawfully threatening employees with discharge and other reprisals, creating the impression of unlawful surveillance of their lawful union activities, coercively interrogating them concerning their membership in, support of, and sympathy for the Union or any other labor organization; or telling them that it would be futile for them to select the Union, or any other labor organization, as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Fort Wayne, Indiana, copies of the attached notice marked "Appendix."¹³ Copies of the notices, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees concerning their membership in, sympathy for, or activities on behalf of United Paperworkers International Union, AFL-CIO, or any other labor organization, and WE WILL NOT unlawfully threaten them with discharge or other reprisals because of their union or other protected concerted activities or tell them that it will be futile for them to select a labor organization as their collective-bargaining representative or create the impression of unlawful surveillance of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

FOAMEX, A LIMITED PARTNERSHIP